No. 7, Original.

Supreme Court of the United States.

OCTOBER TERM, 1930.

THE STATE OF MISSOURI,
Complainant,

v.

THE STATE OF NEBRASKA,
Defendant and Cross Complainant.

BRIEF OF DEFENDANT AND CROSS COMPLAINANT.

EDWARD C. CROW, *Attorney General,*
SAM B. JEFFRIES, *Assistant Attorney General,*
For Complainant.

FRANK N. PROUT, *Attorney General,*
W. H. KELLIGAR, *Special Counsel,*
Solicitors for Defendant and Cross Complainant.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 8, Original.

THE STATE OF MISSOURI,
Complainant,
v.
THE STATE OF NEBRASKA,
Defendant,
and Cross-Complainant.

BRIEF OF DEFENDANT AND CROSS-COMPLAINANT.

EDWARD C. CROW, *Attorney General,*
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For Complainant.

FRANK N. PROUT, *Attorney General,*
W. H. KELLIGAR, *Special Counsel,*
Solicitors for Defendant and Cross-Complainant.

Statement.

This is a suit to establish the middle of the present channel of the Missouri River as the boundary between Atchison County, Missouri, and Nemaha County, Nebraska, to quiet complainant's title to the land on the Missouri side and to perpetually enjoin defendant from disturbing complainant's possession.

Nebraska was admitted into the Union February 9, 1867. (14 U. S. Statutes at Large, p. 392) The Act of Congress authorizing the admission of Nebraska fixed

the middle of the channel of the Missouri River as the boundary between Nebraska and Missouri. (13 U. S. Statutes at Large, p. 16, sec. 2) By a previous Act of Congress passed in 1836 the western boundary of the State of Missouri was extended to the Missouri River. (5 U. S. Statutes at Large, p. 34, ch. 86) That the middle of the channel of the Missouri River was the boundary between the states when Nebraska was admitted into the Union is not disputed in the pleadings or proof. At that time the course of the river between Atchison County, Missouri, and Nemaha County, Nebraska, was in the form of a loop fifteen miles around and almost surrounding a body of land known as Island Precinct, Nemaha County, Nebraska. During high water July 5, 1867, the river suddenly cut a channel across the narrow neck of Island Precinct, abandoned the channel of the fifteen-mile loop and left Island Precinct east of the Missouri River.

The court appointed commissioners who took the testimony and made findings of fact pursuant to the order of court and the following stipulations of the parties:

"Whereas, the honorable commissioners appointed by this court to hear and report the evidence in the case and counsel for the respective parties are in doubt concerning the powers of said commissioners under the order of this court, and the former stipulation between the parties hereto providing for such appointment, it is therefore further stipulated and agreed between the parties hereto that the said commissioners shall in addition to taking and reporting the evidence adduced in said case, make such findings of fact as shall from the evidence seem to them right and proper, and report such findings of fact to the court, and transmit the same to the court along with the evidence so taken and reported." (Stipulation to Submit, p. 3.)

Among the findings of the commissioners are the following:

"1. We find from the evidence that defendant's exhibit B attached to its answer herein, correctly shows the bed and channel of the Missouri River as it existed prior to July 5, 1867; that it was defined and run substantially in the same channel from the admission of the respective states to the Union until July 5, 1867, having only such variations as naturally follow in the course of time in the Missouri River, varying from one side of the river to the other.

"2. We find from the evidence that prior to July 5, 1867, that what was known in Nemaha County, Nebraska, as Island Precinct, which includes McKissick Island, was located in the bend of the river as shown by defendant's said exhibit B, McKissick Island being the northern and eastern portion of said land, situated in the bend of the river, being north of what is marked as the slough in said exhibit. We find that McKissick Island, prior to July 5, 1867, as surveyed by the United States Government, contained 2,910 acres of land. We find that on July 5, 1867, and within one day during the time of high water, the Missouri River cut a new channel across and through the narrow neck of land at the west end of Island Precinct, about one-half mile wide, making for itself a new channel, and passing through the territory of Nebraska for the distance across the neck of the ox-bow, as shown by complainant's exhibit B. We further find that from and after July 5, 1867, the waters of the Missouri River ceased running around McKissick Island and gradually in the course of a few years the old channel dried up and became dry and tillable land and valuable for agricultural purposes, thus vacating the old Missouri bed about fifteen miles in length. We find that complainant's exhibit B shows the bed or channel of the Missouri River as it now runs, and as it has run since July 5, 1867." (Commissioners Findings, pp. 5, 6)

Complainant contends that the middle of the present channel of the Missouri River is now the boundary line and that Island Precinct is now a part of the State of Mis-

souri. Defendant insists that the middle of the abandoned channel of the fifteen-mile loop around Island Precinct is still the boundary between the states, and that Island Precinct was never detached from Nebraska.

The question presented by the record is: Was the boundary changed by the sudden change in the channel of the Missouri River July 5, 1867?

Argument.

Where the course of a river forming the boundary between states is suddenly changed by avulsion, the boundary remains unchanged.

The findings of the commissioners and the evidence adduced before them show that the Missouri River between Missouri and Nebraska changed its course in a single day—July 5, 1867—and left a large area of Nebraska land on the east side. This fact and the correctness of the findings of the commissioners are also established by the following stipulations of the parties hereto:

"Now come the parties in the above entitled cause, by their respective attorneys, and enter into and make the following stipulation and agreement:

"First. It is hereby agreed that the findings of fact made by the commissioners herein, as set out in their report, shall constitute and is a proper finding of fact herein, and is in all respects true and correct, and no exceptions are taken thereto by either party and all exceptions to the said finding of facts are hereby waived.

"It is further agreed that the hereto attached defendant's exhibit B, complainant's exhibit B, defendant's exhibit D, and defendant's exhibit E, with the eleven sectional maps, numbered one to eleven inclusive, together with the field-notes attached thereto, all of which are referred to by the commissioners in their report, shall be

hereto attached and made a part hereof, and that the copies of said exhibits, as hereto attached and made a part hereof, are true and correct copies of the same.

"It is further agreed that the petition to the Federal Congress by the State of Missouri through its legislative branch of government, petitioning Congress to extend the western boundary line of the State of Missouri so as to include what is known as Platte's Purchase, and referred to in complainant's bill, was introduced in evidence by complainant and a copy of which is hereto attached and made a part hereof, and marked complainant's exhibit D.

"It is further agreed that in view of this agreement with reference to the finding of facts by the commissioners, the record of the evidence herein need not be printed and that this cause shall be submitted to the court upon questions of law arising out of the pleadings, the report of the commissioners and this stipulation, and each party shall present to the court in its brief, such propositions of law as it may rely upon." (Stipulation to Submit, p. 2).

It is therefore conclusively established by the record that during a single day—July 5, 1867—the Missouri River abandoned fifteen miles of its channel between Missouri and Nebraska and left a large area of Nebraska territory on the Missouri side of the river. The change having taken place in a single day, it is perfectly clear that no law applicable to accretion could have operated to transfer the territory in controversy from Nebraska to Missouri. The jurisdiction of those states and the status of the citizens do not fluctuate with every freak of the Missouri River. If they did, a large portion of the Nebraska population might go to bed at night in Nebraska and get up in the morning on the same spot in Missouri.

The rule applicable to the facts presented by the record has been stated by this court as follows.

"It is equally well settled that where a stream, which is a boundary, from any cause suddenly abandons its old

and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein." (*Iowa v. Nebraska*, 143 U. S. 361.)

That the boundary line between states does not change with a change in the channel of a river which had been the boundary is shown by an earlier case. In a controversy between Missouri and Kentucky over Wolf Island in the Mississippi River this court said:

"If the river has subsequently turned it course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the states and the island does not in consequence of this action of the water change its owner." (*Missouri v. Kentucky*, 11 Wal. 401.)

This case was followed by the Supreme Court of Nebraska in *Holbrook v. Moore*, 4 Neb., 437.

In *Collins v. State*, 3 Tex. Ct. App. 325, the Texas Court of Appeals said:

"If the course of a river is suddenly changed, the relicted soil remains according to the former bound."

After citing the case of *Iowa v. Nebraska*, 143 U. S., 359, the Common Pleas Court of Hamilton County, Ohio, said:

"In the case at bar, till the new channel was cut through, the water ran in the old channel as above located. When the new channel was cut through, the river ran through that, and the old channel became an abandoned channel. The change was a sudden and rapid change—was avulsion—as distinguished from an imperceptible change—accretion. A change of channel could not in the nature of things be instantaneous. It must require a certain time, but if it is rapid, sudden, as distinguished from an imperceptible change, I think under this late case, it must

be controlled by the law of avulsion." (*Willey v. Lewis*, 28 Weekly L. B. 104)

Complainant in its brief has been unable to refute this point but insists that it is not applicable to the present controversy for the following reason:

"The Act of Congress, annexing Platte's Purchase to the jurisdiction of Missouri, construed in a practical way and in conformity with the legislative memorial of Missouri, approved June [January] 15, 1831, unquestionably fixes the Missouri River as the boundary and brands it as the perpetual and natural monument without further description or further evidence." (Complainant's Brief, p. 2)

This legislative memorial of Missouri will be found on pp. 9-16 of the stipulation to submit. It is an appeal to Congress to extend the western boundary of the State of Missouri to the Missouri River. Complainant insists it was in pursuance of this memorial that Congress in 1836 passed the following act:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that when the Indian title to all the lands lying between the State of Missouri and the Missouri River shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the State of Missouri, and the western boundary of said state shall be then extended to the Missouri River, reserving to the United States the original right of soil in said lands, and of disposing of the same; provided, that this act shall not take effect until the president shall by proclamation declare that the Indian title to said lands has been extinguished; nor shall it take effect until the State of Missouri shall have assented to the provisions of this act." (5 U. S. Statutes at Large, p. 34)

This Act of Congress merely extends the boundary of the State of Missouri to the Missouri River upon extinguishment of the Indian title to the intervening land. The statute does not purport to change the rule of law

that where the course of a river forming a boundary is suddenly changed by avulsion, the boundary remains unchanged. The act furnishes no foundation for complainant's argument that the shifting channel of the Missouri River, wherever it may be, whether changed by accretion or avulsion, is the eternal boundary line between Missouri and Nebraska. If the Missouri River should suddenly cut across the west end of Nebraska, complainant's theory would wipe Nebraska off the map and leave Missouri in possession of a vast empire acquired without regard to the rights of the inhabitants. No such conclusion is deducible from the enactment quoted.

But the argument of complainant seems to be that the act of Congress derived some additional significance from the legislative memorial of Missouri, in pursuance of which the statute was enacted. The memorial amounts to nothing more than an argument in favor of the passage of the act. The intention of Congress is clearly expressed in the enactment and there is no occasion to resort to the memorial, either to ascertain the legislative will or to give effect to the statute.

When the legislative memorial of Missouri was adopted there was a strip of land between the western boundary of that state and the Missouri River. According to the memorial this strip was the land of the outlaw and the savage and the Missouri River was the only great highway of the region. In the interests of civilization Congress, therefore, was memorialized to extend the jurisdiction of the State of Missouri to the Missouri River. If there was any reason at that time why the jurisdiction of Missouri should follow every change in the course of the Missouri River, that reason does not now exist. Outlawry and savagery are now unknown in Platte's Purchase and there is order in every part of the region on both sides of the river.

The legislative memorial of Missouri, however, added nothing to the Act of Congress extending the boundary of Missouri to the Missouri River. The general rule applicable to boundaries was not changed. The Act of Congress made the Missouri River as then existing the boundary. All the territory added to the Missouri side of the river by accretion is within the jurisdiction of that state, but Missouri never had any jurisdiction over any tract of land transferred from the west side to the east side by a sudden change in the channel.

Had Nebraska never been admitted into the Union, the State of Missouri would not now have jurisdiction of a crime committed on the land in dispute known as Island Precinct.

In *Collins v. State*, 3 Tex. Ct. App. 323, the report of the case shows that a crime was committed on a 150-acre tract of land on the Texas side of the river which had been the boundary between Texas and the Choctaw Nation; that the land described had formerly been part of the territory of the Choctaw Nation, but was changed to the Texas side of the river by a change in the channel thereof; that the criminal was tried and convicted in the county court of Bowie County, Texas; and that he took the case to the Court of Appeals where the prosecution was dismissed. The Texas Court of Appeals held that the tract of land where the crime was committed was part of the territory of the Choctaw Nation and that Texas had no jurisdiction of the crime. The court said:

"The land lying in the 'cut-off' between the old river and the new channel, as testified to by the witnesses in this case, is in the Choctaw Nation, and the old river-bed is the boundary line between Texas and the Choctaw Nation at that point." (*Collins v. State*, 3 Tex. Ct. App. 324)

It follows, therefore, that neither the necessity for the police protection promised by the memorial nor the

Act of Congress extending the boundary could add any land to Missouri by the action of the river in suddenly changing its course to a different channel.

It is a rule of the courts both State and Federal that where the course of a river forming the boundary between States is suddenly changed by avulsion, the boundary remains unchanged.

It is respectfully urged that the rule stated in the cases cited resolves against complainant the only point presented by the record in this case, and that a decree should be entered dismissing the petition at complainant's costs, and establishing the center of the abandoned channel of the Missouri River as the boundary in dispute.

Respectfully submitted,

FRANK N. PROUT, *Attorney General,*
W. H. KELLIGAR, *Special Counsel,*

Solicitors for Defendant and Cross-Complainant.

August 6, 1904.

FILED
DEC 3 1902
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

STATE OF MISSOURI, Plaintiff.
vs.
STATE OF NEBRASKA, Defendant.

5 Orig

STIPULATION.

THE STATE OF MISSOURI,

By _____,
Attorney-General of Missouri.

THE STATE OF NEBRASKA,

By _____,
Attorney-General of Nebraska.

TRIBUNE PUB. CO., JEFFERSON CITY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

STATE OF MISSOURI, Plaintiff.
vs.
STATE OF NEBRASKA, Defendant.
} STIPULATION.

It is hereby STIPULATED by and between the State of Missouri and the state of Nebraska, that the above entitled cause, as well as the cause of the State of Nebraska vs. the State of Missouri, may be referred to two Commissioners, to take the testimony pertinent to issues raised by the Bill of the State of Missouri, the Answer thereto of the State of Nebraska, and the Reply of the State of Missouri, as well as the Cross-bill of the State of Nebraska, the Answer thereto by the State of Missouri, and the Reply of the State of Nebraska, and report the facts and their findings thereon to the Court within a reasonable time.

It is further stipulated by the said parties, that Mr. Alfred Hazlett of the Bar of the Supreme Court of Nebraska, and Mr. John W. Halliburton of the Bar of the Supreme Court of Missouri, may be appointed as said Commissioners.

It is further stipulated by the said parties, that each party may have such time as it may desire to file such pleadings as it may be advised are necessary, subject to such limitations as the Court may fix.

THE STATE OF MISSOURI,

By _____,
Attorney-General of Missouri.

THE STATE OF NEBRASKA,

By _____,
Attorney-General of Nebraska.